United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 76-7015

To be argued by
DAVID GREENE

In The

United States Court of Appeals

For The Second Circuit

KENIL K. GOSS,

Plaintiff-Appellant,

vs.

REVLON, INC. and Its Wholly Owned Subsidiary, USV PHARMACEUTICAL CORPORATION,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-7015

KENIL K. GOSS,

Plaintiff-Appellant,

-against-

REVLON, INC. and ITS WHOLLY OWNED SUBSIDIARY, USV PHARMACEUTICAL CORPORATION,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT AND ISSUES PRESENTED

Plaintiff has appealed from the order of the United States District Court, Southern District of New York, (Honorable

Richard Owen) granting defendants' cross motion for summary judgment and denying plaintiff's motion for leave to serve an amended complaint to assert a class action.

Plaintiff thereafter moved for a new trial. The District Court (Honorable Richard Owen) treated said motion as a motion to reargue under Local Rule 9(m) and denied said motion. Plaintiff has, accordingly, appealed from both orders.

The district court did not err when it granted defendant's cross-motion for summary judgment. Plaintiff clearly failed to comply with the jurisdictional prerequisites under Title VII of the Civil Rights Act of 1964. Plaintiff's employment was terminated on March 7, 1972 and he did not file a charge with the Equal Employment Opportunity Commission (hereinafter EEOC) until March 20, 1973.

The district court did not err since plaintiff failed to show any extenuating circumstances to excuse his untimely filing and he failed to show that the alleged discriminatory practices were continuing violations.

The district court did not err when it denied plaintiff's motion for leave to serve an amended complaint to assert a class action. Plaintiff moved for leave to serve an amended complaint nearly two years after instituting this action. Pursuant to the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure, plaintiff was clearly not a proper party to represent

the alleged class. The causes of action for which plaintiff sought leave to plead in the proposed amended complaint would have been subject to dismissal.

The district court did not err when it denied plaintiff's motion to reargue under Local Rule 9(m) since plaintiff failed to establish any facts or cite any applicable legal precedent which would support his application. All references relate to the original record and supplements thereto.

STATEMENT OF FACTS

The summons and complaint were served upon defendants on or about December 18, 1973. The action is brought pursuant to Title VII of the Civil Rights Act of 1964 for employment discrimination with respect to plaintiff's race, color, age, religion and national origin. It is further alleged that jurisdiction is conferred by 42 U.S.C. 2000 e-5. The acts complained of include termination of employment, failure to promote and thirty-eight other alleged discriminatory practices listed on the schedule attached to the complaint. On or about January 7, 1974, defendants, by their attorneys, answered the complaint. The answer denies any discriminatory conduct by defendant and alleges, as an affirmative defense, that plaintiff has failed to comply with the jurisdictional prerequisites of 42 U.S.C. Section 2000 e-5 in that (1) a timely charge was not filed with EEOC (2) plaintiff has not exhausted available administrative

remedies since a charge was not filed with the New York State Commission on Human Rights prior to filing of a charge with the Equal Employment Opportunity Commission and (3) plaintiff has not exhausted available administrative remedies since there is alleged a pending proceeding before the New York State Commission on Human Rights.

Plaintiff was employed by defendant USV on April 14, 1967, as an Operations Auditor at a salary of $11,000.00 per annum. Plaintiff received a number of salary increases and thereafter was promoted to a Staff Assistant on December 1, 1971, assigned to U.S.V. International Finance Division at a salary of $16,500.00 per annum. On March 7, 1972, plaintiff's employment was terminated due to a re-organization plan just prior to the transfer to Paris of the U.S.V. International Finance Division (Affidavit in Support of Motion for Summary Judgment, Page 2).

Plaintiff is not the ordinary pro se plaintiff without benefit of legal training. In his statement to EEOC, plaintiff set forth the following credentials: Bachelor of Commerce (B.Com.), Masters of Arts (M.A.) and Bachelor of Laws (LLB) from Calcutta University. He is also a New York State C.P.A., is studying for a Masters of Business Administration (M.B.A.) at New York University and is an applicant for admission to the Bar in New York State and for a Masters of Law (L.L.M.) at New York University.

(Plaintiff's Affidavit in Opposition to Defendants' Cross Motion For Summary Judgment, Exhibit 3, Page 11).

Although plaintiff continuously characterizes himself as "a non-English speaking alien" and "a non-lawyer" without benefit of legal counsel, it is clear that plaintiff has extensive legal training, having received a law degree and being an applicant for a post graduate law degree and for admission to the New York State Bar. It is also clear that plaintiff considers himself "fluent" in English having studied for 15 years and lived in English speaking countries for 40 years with excellent diction and capable of winning many debates. (Plaintiff's Affidavit in Opposition, Exhibit 3, Page 12).

Although his employment was terminated on March 7, 1972, it is conceded that plaintiff did not file charges with EEOC until March 20, 1973. (Complaint, Para. 7).

Plaintiff alleges that he filed charges with the New York State C ssion on Human Rights on October 10, 1973 (Complaint, Para. ; however, defendant never received a copy of said charge. In any event, no charge alleging unlawful employment practice was filed by plaintiff with any state or federal agency until more than one year after termination of his employment.

Plaintiff alleges that the discriminatory acts occurred from April 14, 1967 to December 6, 1973 and the practice "is

continuing" (Complaint, Paragraphs 5 and 5a). There is no merit to the plaintiff's allegations of discriminatory practices past or present. On October 10, 1973, EEOC dismissed plaintiff's charge on the grounds that there was "no jurisdiction" and "untimely charge." (Affidavit in Support of Defendants' Cross Motion for Summary Judgment, Exhibit C). Obviously, if the alleged practices of defendants had been continuous from April 14, 1967 to December 6, 1973, EEOC would not have dismissed plaintiff's charge in October of 1973 because of "untimely" filing. EEOC clearly found that the practices alleged were not continuous. Plaintiff seeks to avoid that finding by merely adding the word "continuing" to his complaint.

Furthermore, plaintiff's charge of discrimination filed with EEOC on March 20, 1973 stated that the "most recent date" on which this discrimination took place was "March 31, 1972." (Affidavit, Cross-Motion For Summary Judgment, Exhibit D). Accordingly, plaintiff has admitted that the discriminatory practices alleged were not "continuous." The last act of discrimination occurred approximately one year prior to filing of his charge.

Upon the hearing of defendants' cross-motion for summary judgment, Judge Owen questioned plaintiff about his allegations of extenuating circumstances which prevented the timely filing of charges with EEOC. (Transcript, November 7, 1975). During the one year period after termination of his employment, plaintiff was physically able to visit doctors, to shop for groceries,

to travel to Mexico, to write letters and make telephone calls, to go to the post office and to go outside and travel about New York City.

Although issue was joined in this action in January of 1974, defendant's discovery was seriously hampered by plaintiff's dilatory tactics and intentional refusal to obey court orders. The record indicates that defendants were required to file three motions to compel discovery and that Judge Owen conditionally granted defendants' last motion to dismiss the complaint and assessed $50.00 costs against plaintiff. Plaintiff, in his Brief, refers to such ruling as an "arbitrary fine." (Page 10).

Plaintiff's papers below and on this appeal are replete with scandalous and defamatory statements relating to defendants, their attorneys, Judge Owen and Magistrate Raby. Defendants are accused of perjury and their attorneys of subornation of perjury. Magistrate Raby is accused of bias and prejudice, as is Judge Owen. Plaintiff has contemptously stated, under oath, that the decision appealed from was the result of a "mutual arrangement" and "package deal" and further alleges that the trial judge had preconceived notions and gave legal advice to defendants' counsel with respect to defendant's Motion for Summary Judgment. (Plaintiff's Affidavit of Bias or Prejudice, Page 3).

Appellant's brief refers to the foregoing and repeats the scandulous matter contained therein and should be stricken, Rule 28(1) of the Second Circuit.

POINT ONE

THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SINCE PLAINTIFF FAILED TO COMPLY WITH THE JURISDICTIONAL PREREQUISITES OF THE CIVIL RIGHTS ACT OF 1964

Defendants were entitled to summary judgment dismissing the complaint as a matter of law since plaintiff failed to comply with the jurisdictional prerequisites contained in 42 U.S.C. 2000 e-5. Title VII of the Civil Rights Act of 1964 sets forth the procedures for prevention of alleged unlawful employment practices.

42 U.S.C. 2000 e-5 (e) relates to the time for filing charges with EEOC as follows:

> "(e). A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after

> the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency." (Emphasis supplied).

The filing of charges with the EEOC is subject to the aforesaid time limitations. If there is no applicable state or local law prohibiting unlawful job practices, the aggrieved individual must file the charge within one hundred eighty days after the alleged unlawful conduct occurred. If there is an applicable state or local law to which recourse must be had, the individual is required to file the charges with the EEOC within three hundred days after the alleged unlawful conduct occurred, or within thirty days after the individual receives notice that the state or local proceedings have ended, whichever is earlier. An aggrieved individual must comply with these time limits.

Compliance with these limitations is jurisdictional. "The requirement that a complainant must invoke the administrative process within the time limitations set forth in Section 706(d) is a jurisdictional precondition to the commencement of a court action." Choate v. Caterpillar Tractor Co., 402 F. 2d 357 (7th Cir. 1968). This rule has been uniformly followed in a number of recent decisions. See Moore v. Sunbeam Corp., 459 F2d 811 (7th Cir. 1972); Malone v. North American Rockwell Corp., 457 F2d 779 (9th Cir. 1972); Sanchez v. Standard Brands, Inc., 431 F2d 455 (5th Cir. 1970), Davidson v. Tapley, 75 Civ.

1090 (S.D. N.Y. 1975).

In Moore, supra, the Court analyzed the statutory scheme of the Civil Rights Act and stated at 459 F2d, pages 20-821:

> "Before analyzing the specific timeliness issues presented by this record, a brief comment of the statutory scheme is necessary. As a part of a compromise which made it possible to pass the Civil Rights Act of 1964, its sponsors agreed to the inclusion of provisions which impose an extremely short limitations period on private claims and require a resort to state procedures, when available, as a condition precedent to a private action in the federal courts. If the state where the alleged violation occurred provides no remedy, the complaintant must file his charge with the EEOC within 90 days; if a state remedy is available, it must be exhausted before the federal charge is filed. To allow time for such exhaustion, in such states, the charge need not be filed for 120 days; to enforce the exhaustion requirement and give the state agency an adequate opportunity to act first, the federal charge may not be filed until 60 days after the state procedure has been initiated (unless it terminates in less than 60 days)."

Of course, the 1972 amendments changed the respective time periods from ninety days to one hundred eighty and from two hundred ten days to three hundred. In any event, plaintiff never exhausted his available state remedy. The complaint alleges that a state charge was filed with the New York Commission on Huam Rights in October of 1973 (about five hundred forty days after termination of employment). No proof has been offered that such a charge was ever filed by plaintiff nor was a copy thereof ever received by defendants. No EEOC charge was filed

until March of 1973 (about three hundred sixty days after termination of employment).

POINT TWO

THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SINCE PLAINTIFF FAILED TO PROVE THAT THE ALLEGED DISCRIMINATORY ACTS WERE CONTINUING

In Moore, supra, the Court found that neither the charge, concurrent affidavit, nor subsequent statement alleged any specific acts of discrimination in the period between May 23, 1967 (the date determined by subtracting two hundred ten days from the filing date) and August 7, 1967 (the date of the alleged most recent discrimination). The only allegations relating to the period were merely "conclusory statements." See 459 F2d 828. In the instant case, plaintiff stated in his EEOC charge of discrimination that the most recent date of discrimination was March 31, 1972 - almost one year prior to the date he filed his charge.

In Davidson, supra, the Court dismissed the complaint under Title VII and stated:

> "Job transfers, layoffs and terminations have each been held t be isolated and 'completed' acts. Molybdenum Corp. v. E.E.O.C., 457 F2d 935 (10th Cir. 1972); Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974); Gordon v. Baker Protective Services Inc., 358 F. Supp. 867 (N.D. 111 1973); Guerra v. Manchester Terminal Corp., 350 F.Supp. 529 (S.O. Texas 1972); Younger v. Glamorgan Pipe & Foundry Co., 310 F.Supp. 195 (W.D. Va. 1969)."

In the present case, EEOC rejected plaintiff's charge as untimely and the insertion of the word "continuing" in his complaint cannot avail him to avoid the jurisdictional limitations of 42 USC 2000 (e) (5). See Cox v. United States Gypsum Company, 409 F2d 289 (7th Cir. 1969).

POINT THREE

PLAINTIFF'S PROPOSED AMENDED COMPLAINT ALLEGING AGE DISCRIMINATION IS JURISDICTIONALLY DEFECTIVE

Plaintiff sought leave to amend his complaint to assert a class action claim under 29 USC 626 for discrimination because of age. However, similar to Title VII, the Age Discrimination On Employment Act also mandates that charges must first be filed with the Secretary of Labor before commencement of any civil action.

29 U.S.C. 626(d) provides:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed (1) within one hundred eighty days after the alleged unlawful practice occurred . . . ." (Emphasis supplied).

Cochran v. Ortho Pharmaceutical Co., 367 F.Supp. 302 D.C. La. 1971); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F2d 1195 (5th Cir. 1975); Hiscott v. General Electric Co., 8 EPD Cases §9735 (N.D. Ohio 1974).

Plaintiff has obviously not complied with these provisions nor does he so allege.

POINT FOUR

PLAINTIFF DID NOT SATISFY THE PREREQUISITES FOR A CLASS ACTION

Plaintiff sought leave to amend his complaint to assert a class action claim for employment discrimination.

Rule 23(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the classes or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class."

None of these factors was satisfied by the proposed amended complaint. There is no class affected by the alleged discrimination other than plaintiff himself. All the allegedly discriminatory practices were directed at him personally (Plaintiff's proposed amended complaint, page 32).

Plaintiff has not demonstrated the competence to adequately protect the interests of the class. He states that he is without legal counsel and that he is in very poor physical health. The general standard appears to be that the representative

must be of such a character as to assure the vigorous prosecution of the action so that the members are certain to be protected. Hohmann v. Packard Instrument Co., 399 F2d 711 (7th Cir. 1968).

In Jeffrey v. Malcolm, 353 F. Supp. 395 (S.D. N.Y. 1973) the Court held that a pro se plaintiff had not evidenced any special qualifications which might justify maintenance of a class action and the class action was dismissed. Upon argument of the Motion for Summary Judgment below, Judge Owen stated to plaintiff that he did not believe that he was the proper party to bring a class action.

In addition to the prerequisites of Rule 23(a), Rule 23(b)(3) provides that the common questions of law or fact must predominate over the individual issues presented by the dispute. See Green v. Wolf Corp., 406 F2d 291 (2d Cir. 1968).

It is clear that the proposed amended complaint presented some forty alleged discriminatory acts which relate solely to the plaintiff. If there are common questions of law or fact, a reading of the amended complaint clearly established that the individual issues "predominate." The relief sought and the issues presented relate entirely to the plaintiff who seeks compensation for his losses; reimbursement of his expenses; readjustment of his monthly disability benefits, rectification of his employment records and his reinstatement to a consultant's

position commensurate with his education, experience and training.

Plaintiff has delayed almost two years in seeking to amend to a class action theory. Such delay, after extensive discovery has been completed, is prejudicial to defendants. Troxel Mfg. Co. v. Schwinn Bicycle Co., 489 F2d 968 (6th Cir. 1973).

Plaintiff sought leave to amend from an individual action to a class action because he realized that his original complaint was jurisdictionally defective and subject to dismissal. Accordingly, he would seek to disguise his original complaint as a class action in order to avoid this defect.

POINT FIVE

THE PROPOSED AMENDED COMPLAINT ALLEGING A CAUSE OF ACTION UNDER THE CIVIL RIGHTS ACT OF 1866 IS BARRED

The applicable statute of limitations with respect to actions under 42 USC 1983 and 42 USC 1981 is three years since it is governed by the statute of limitations of 214(2) of the New York Civil Practice Law and Rules which governs "liability created by statute." Davidson v. Tapley, supra.

In any event, Section 1983 is inapplicable since "a private party violates 42 USC 1983 only to the extent its conduct involves state action." De Matteis v. Eastman Kodak, 511 F2d 306 (2nd Cir. 1975). No such action is alleged.

Since the last act of discrimination occurred in March of 1972, the entirely new and unrelated class action claim alleging racial discrimination under the Civil Rights Act of 1866 would not "relate back" and the cause of action would be time barred.

In Johnson v. Railway Express Agency, Inc., 95 S. Ct. 1716 (1975), the Supreme Court held that the timely filing of an employment discrimination charge with EEOC pursuant to Title VII did not toll the running of the limitation period applicable to an action based upon the same facts brought under the Civil Rights Act of 1866. The Court stated at 75 S. Ct. 1721:

> "We generally conclude, therefore, that the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct and independent.

In Johnson, supra, the Supreme Court stated that the Civil Rights Act of 1866 "relates primarily to racial discrimination in the making and enforcement of contracts" and "affords a federal remedy against discrimination in private employment on the basis of race."

Accordingly, 1981 provides a remedy for racial discrimination only.

The cause of action for which plaintiff sought leave to amend was based upon racial discrimination pursuant to the Civil Rights Act of 1866 and would have to be dismissed. Plaintiff has

stated that he is a native of India, having been born in that country on August 15, 1930 and that his complexion is "fair." (Plaintiff's affidavit in opposition to defendant's Cross Motion for Summary Judgment, Exhibit 3, Page 10).

For purposes of filing information returns with EEOC, standardized race/ethnic categories have been developed. EEOC has defined the term "White (not of Hispanic origin)" to mean "any of the original peoples of Europe, North Africa, the Middle East or the Indian subcontinent." Since plaintiff is a native of the Indian subcontinent, he would be considered as a member of the white race and a racial discrimination claim must be dismissed. See EEO-1 Employer Information Report, EEO-2 Apprenticeship Information Report, EEO-3 Local Union Information Report. There are no facts or allegations to support a claim of racial discrimination.

In his Charge of Discrimination filed with EEOC, plaintiff did not check "race or color" as the basis of discrimination; he only checked "national origin." (Affidavit in support of Defendants' Motion for Summary Judgment, Exhibit D). Plaintiff further stated that "I have been discriminated against because of my national origin (India)." Plaintiff did not allege racial discrimination. Accordingly, his belated attempt to amend to plead a cause of action under the Civil Rights Act of 1866 would have to be dismissed since that statute only applies to discrimination on account of race.

POINT SIX

THE DISTRICT COURT DID NOT ERR WHEN IT DENIED PLAINTIFF'S MOTION TO REARGUE

Plaintiff moved for a new trial based upon what he characterized as new evidence, relying upon a recent decision. Moses v. Falstaff Brewing Corp., 10 EPD 10,407 (8th Cir. 1975). The District Court treated the foregoing as a motion to reargue under Local Rule 9(m) and denied the motion. The District Court was correct.

In Moses, the sole issue raised was compliance with the notice requirement of the Age Discrimination in Employment Act. On May 24, 1974, Moses gave notice of her intent to sue to the Secretary of Labor. The issue was whether Moses was discharged on November 12, 1973 when she was advised of her discharge or on November 30, 1973 when she was "officially terminated for administrative purposes of the Company."

The Court held that the November 30th date was determinative and stated:

> "The date of official termination would seem more easily ascertainable since in some cases it might be difficult to determine when oral notice was given to an employee. Likewise, official administrative termination eliminates ambiguity as to the finality of the discharge."

There is no ambiguity as to the finality of plaintiff's discharge. He has stated that "on March 7, 1972 at 5:15 P.M." he was discharged and "two security guards whisked (him) outside

the office building." (Plaintiff's affidavit in opposition, Exhibit 3, Page 48).

The distinction made in Moses is inapplicable in the instant case since the date of notice of discharge and the official administrative termination were one and the same - March 7, 1972. Plaintiff contends that payment for 66 days of severance and vacation pay resulted in the termination of his employment on June 6, 1972. However, it is clear that the "official administrative termination" date, as reflected in defendant USV's personnel records, was March 7, 1972. (Affidavit, Defendant's Motion for Summary Judgment, Page 2).

CONCLUSION

The orders appealed from should be affirmed.

Respectfully submitted,

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A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS:2nd CIRCUIT

GOSS,

Plaintiff-Appellant,

- against -

REVLON,

Defendant-Appellee.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 7th *day of* June *1976, deponent served the annexed*

Brief *upon* Kenil K. Goss, pro se ~~attorney(s) for~~

in this action, at 21 Fairview Avenue, Tuckahoe, New York 10707

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 7th *day of* June *19*76.

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS